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**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

PENSKE MEDIA CORPORATION,  
 dba PMC, a Delaware corporation,

Plaintiff,

vs.

PROMETHEUS GLOBAL MEDIA,  
 LLC, a Delaware limited liability  
 company d/b/a hollywoodreporter.com;  
 and DOES 1 through 10, inclusive,

Defendants.

Case No.: CV 11-7560-VBF (MRWx)  
 Assigned to: Hon. Josephine Staton  
 Tucker  
 Magistrate: Hon. Michael R. Wilner

**DISCOVERY MATTER:  
 PLAINTIFF PENSKE MEDIA  
 CORPORATION'S NOTICE OF  
 MOTION AND JOINT  
 STIPULATION RE: FURTHER  
 RESPONSES TO WRITTEN  
 DISCOVERY PROPOUNDED TO  
 DEFENDANT PROMETHEUS  
 GLOBAL MEDIA, LLC;**

**DECLARATION OF STEVEN B.  
 STIGLITZ IN SUPPORT AND  
 [PROPOSED] ORDER (filed  
 concurrently)**

**DECLARATIONS OF MANISH M.  
 SHAH AND ANTHONY  
 SBARDELLATI IN OPPOSITION  
 (filed concurrently)**

Action filed: September 14, 2011  
 Discovery Cut-off: November 9, 2012  
 Pre-trial Conference Date: June 28, 2013  
 Trial Date: July 9, 2013  
 Hearing Date: January 9, 2013  
 Hearing Time: 9:30 a.m.  
 Hearing Location: Courtroom H (9<sup>th</sup> Fl.)



1 TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF  
2 RECORD:

3 PLEASE TAKE NOTICE THAT, on January 9, 2013 at 9:30 a.m. or as soon  
4 thereafter as this matter may be heard by the above-titled Court, located at 312 North  
5 Spring Street Los Angeles, CA 90012, Courtroom H (9<sup>th</sup> Floor), Los Angeles, CA 90012,  
6 pursuant to Federal Rules of Civil Procedure 26, 33, 34, 36 and 37, and Local Rules 37-1,  
7 37-2, Plaintiff Penske Media Corporation ("Penske") will and hereby does move, as set  
8 forth in the attached Joint Stipulation to this Court, for an order compelling Defendant  
9 Prometheus Global Media ("Prometheus") to provide further responses to Penske's First  
10 Set of Special Interrogatories and Penske's First Set of Requests for Admission, and to  
11 produce documents responsive to Penske's First Set of Requests for Production.

12 Specifically, Penske asks the Court to compel Prometheus to provide a further  
13 response to the special interrogatories numbered 1, 6, 10-15, and 16 in Penske's First Set  
14 of Special Interrogatories.

15 Further, Penske asks the Court to compel Prometheus to provide a further response  
16 to, and to produce documents responsive to, the requests for production of documents  
17 numbered 1-10, 27-55, 56-59 in Penske's First Set of Requests for Production.

18 Further, Penske asks the Court to compel Prometheus to provide a further response  
19 to the requests for admission numbered 1-7 and 8-41 in Penske's First Set of Requests for  
20 Admission.

21 Penske submits this Joint Stipulation on the grounds that Prometheus lacks  
22 substantial justification to object to the discovery at issue, which relates to core issues in  
23 this case, including:

24 (1) Any work that Prometheus purportedly performed to ensure that the home page  
25 of its website did not material infringing on the computer source code that Penske used  
26 for its website homepage;

27 (2) Any profits that Prometheus earned in connection with the use of Penske's  
28 copyrighted source code;



1 (3) The scope of work that Prometheus performed or hired others to perform in  
 2 connection with the project that resulted in Prometheus' copying of the Penske's  
 3 copyrighted source code;

4 (4) Other recent instances of unfair competition by Prometheus against Penske,  
 5 including the unlawful recruitment of Penske's employees and the unlawful copying of  
 6 Penske's hot news articles.

7 This Notice of Motion and Motion is based on the attached Joint Stipulation, all  
 8 points and authorities cited therein, the accompanying declaration of Steven B. Stiglitz  
 9 and the attached exhibits thereto, any relevant matters of which the Court may take  
 10 judicial notice, and any argument of counsel that shall be permitted at the hearing of this  
 11 Motion.

12 Counsel for the parties met and conferred regarding the discovery in compliance  
 13 with Local Rule 37-1. (Stiglitz Decl. ¶ 9, Ex. H (Meet and Confer Letter), ¶ 10, Ex. I  
 14 (Response to Meet and Confer Letter), ¶ 11 (Telephonic Meet and Confer Session); ¶ 12,  
 15 Ex. J (Scheduling Order).)

16  
 17 Dated: November 28, 2012

FREEDMAN & TAITELMAN, LLP

18  
 19 By:

/s/  
 Bryan J. Freedman  
 Steven B. Stiglitz  
*Attorneys for Plaintiff*  
*Penske Media Corporation*



**I. PLAINTIFF PENSKE MEDIA CORP'S INTRODUCTORY STATEMENT**

This case arises from The Hollywood Reporter's blatant word-for-word copying of the source code used to create the website homepage for TVLine.com, another top media source that focuses on the entertainment industry. The parent company of TVLine.com, Plaintiff Penske Media Corporation ("Penske"), caught The Hollywood Reporter red-handed and promptly filed this lawsuit for copyright infringement against the parent company of The Hollywood Reporter, Defendant Prometheus Global Media, LLC ("Prometheus"). Prometheus promptly issued a press release stating that it would remove the offending the source code from The Hollywood Reporter website and conduct an "investigation" into how the copying occurred. Prometheus has since contended that the copying occurred as a result of a supposed miscommunication between Prometheus and the vendor Prometheus hired to create the offending website homepage, Ifran Ali of Nihaki Systems, Inc. ("Nihaki")

Penske propounded its First Set of Requests for Production (the "RFPs"), First Set of Special Interrogatories (the "Interrogatories"), and First Set of Requests for Admission (the "RFAs") early in 2012. Despite several attempts to meet-and-confer regarding these discovery requests, Prometheus still has not produced a single document responsive to any of the RFPs and Prometheus still refuses to respond to the vast majority of the Interrogatories and the RFAs. Penske submits this Joint Stipulation on the grounds that Prometheus lacks substantial justification to object to the discovery at issue, which relates to core issues in this case, including:

(1) Any inspection that Prometheus' internal software engineers or other employees performed to ensure that its vendor competently and lawfully performed the task assigned to it;

(2) Any profits that Prometheus earned in connection with the use of Penske's copyrighted source code;

(3) The scope of work that Prometheus performed or hired others to perform in connection with the project to update the homepage for The Hollywood Reporter, which



1 was the project that resulted in Prometheus' copying of the Penske's copyrighted source  
2 code; and

3 (4) Other recent instances of unfair competition by Prometheus against Penske,  
4 including the unlawful recruitment of Penske's employees and the unlawful copying of  
5 Penske's hot news articles.

6 Given that Prometheus admits that it copied-and-pasted dozens of pages of source  
7 code from Penske's website, Penske's request for further responses and production in this  
8 Joint Stipulation is eminently reasonable. Therefore, the Court should grant the motion.

9 **II. DEFENDANT PROMETHEUS'S INTRODUCTORY STATEMENT**

10 Penske's attempted motion to compel is both untimely and meritless. Discovery in  
11 this case closed on November 9, 2012. While discovery was open, Penske made barely  
12 any effort to develop the facts. For example, Penske noticed only one deposition and  
13 took none; it sought documents from Prometheus but did not finalize the protective order  
14 that was necessary to actually obtain them; and it made sweeping objections to the  
15 production of its own documents. At the same time, mediation in the case has been  
16 unsuccessful thus far. The result for Penske is no doubt uncomfortable: a case that is  
17 neither settled nor, from Penske's perspective, ready for trial. That discomfort explains  
18 why Penske is making this motion, but it does not provide any basis for the Court to  
19 entertain or grant it.

20 The motion is untimely because the Court-imposed deadline for filing motions to  
21 compel discovery was November 19, 2012. *See* Decl. of Anthony Sbardellati ¶ 4 & Ex.  
22 B at § 4, submitted herewith in opposition to Penske's motion to compel. Local Rule 37-  
23 2.1 required Penske to provide Prometheus with 7 days to complete Prometheus's portion  
24 of this joint stipulation, following which Prometheus was also entitled to one business  
25 day to review and sign the final joint stipulation. Penske did not provide a proper draft of  
26 the joint stipulation until the evening of Wednesday November 14, 2012 - only five days  
27 before the deadline rather than the seven required by the rule. *See* Sbardellati Decl. ¶ 3.  
28 The motion should be denied on that basis alone.



1 The motion also is meritless. This is a very simple case and Penske is attempting  
 2 to broaden it with sweeping discovery that goes far beyond the matters actually at issue.  
 3 The complaint lists one cause of action, for copyright infringement. This arises from an  
 4 incident where a contractor for Prometheus copied a small amount of routine code from a  
 5 Penske website, and Prometheus used the code on its own website for all of three weeks.  
 6 Prometheus promptly took down the code after suit was filed. This plainly caused  
 7 Penske no harm and earned THR no profits. Indeed, the only reason this matter even  
 8 came to court is that Penske chose to exploit it for publicity purposes by filing suit rather  
 9 than advising Prometheus informally. Yet Penske is moving for discovery of a wide  
 10 range of matters that have nothing to do with the code incident, including Prometheus's  
 11 editorial and hiring practices as well as website development issues that have nothing to  
 12 do with the alleged copyright infringement.

13 Penske and Prometheus are fierce competitors in the business of entertainment  
 14 journalism. Penske should not be allowed to use this lawsuit to attempt to catch up in the  
 15 market by conducting a general fishing expedition into the affairs of Prometheus and its  
 16 highly successful THR property.

17 If the Court decides to consider Penske's motion, despite its untimeliness, then  
 18 Prometheus respectfully submits that the Court should also consider Prometheus's own  
 19 motion to compel, to be filed separately. As set forth in that motion, Penske has seriously  
 20 defaulted on its own discovery obligations.

### 21 22 **III. PENSKE'S STATEMENT OF RELEVANT FACTS**

#### 23 **A. The Gravamen of the Complaint**

24 In the Complaint, Penske alleges that its entertainment industry publications,  
 25 including Deadline Hollywood and TVLine, have made substantial investments in hiring  
 26 talented reporters to beat the competition to the important news stories and in hiring  
 27 talented internal software engineers to create elegant and user-friendly websites. As a  
 28



1 result, Penske alleges that Deadline Hollywood and TVLine had become more popular  
2 and better websites than The Hollywood Reporter, which is a traditional entertainment  
3 industry powerhouse whose status has lagged due to neglect.

4 Prometheus has taken unlawful measures in an attempt to help The Hollywood  
5 Reporter regain its once-prominent status in the entertainment industry.

6 First, Prometheus remade The Hollywood Reporter website in TVLine's image. It  
7 is undisputed that The Hollywood Reporter's redeveloped website copied dozens of pages  
8 of Penske's source code word-for-word and thereby replicated the featured module on  
9 TVLine's elegant and user-friendly home page.

10 Second, Prometheus has engaged in a pattern of copying the content of news  
11 articles from Penske's websites as well. Penske can show that Prometheus is copying  
12 stories rather than coincidentally writing stories on the same subjects because The  
13 Hollywood Reporter's stories have contained a number of arbitrary features of articles  
14 that Deadline Hollywood published on the same subjects. For example, as alleged in the  
15 Complaint, Deadline Hollywood randomly happened to publish stories about two  
16 completely unrelated television scripts in one combined news article. Then, minutes  
17 later, The Hollywood Reporter posted the same two stories in the same manner.

18 Third, Prometheus attempted to recruit Penske employees who were under long-  
19 term contracts. Although these efforts proved largely unsuccessful, Prometheus' attempt  
20 to interfere with Penske's employment contracts reflects Prometheus' intent to use any  
21 means necessary to undermine Penske's competitive advantage over Prometheus.

22 B. Procedural History

23 Prometheus served its Initial Disclosures in February 2012. (Declaration of Steven  
24 B. Stiglitz ("Stiglitz Decl.") ¶ 2, Ex. A (Initial Disclosures).)

25 Penske propounded the discovery at issue in March 2012. (Declaration of Steven  
26 B. Stiglitz ("Stiglitz Decl.") ¶ 3, Ex. B (RFPs), ¶ 4, Ex. C (Interrogatories), ¶ 5, Ex. D  
27 (RFAs).)  
28



1 Prometheus responded to the discovery at issue in April 2012. (Stiglitz Decl. ¶ 6,  
2 Ex. E (Objections and Responses to RFPs), ¶ 7, Ex. F (Objections and Responses to  
3 Interrogatories), ¶ 8, Ex. G (Objections and Responses to RFAs).)

4 Counsel for the parties met and conferred regarding the discovery in compliance  
5 with Local Rule 37-1. (Stiglitz Decl. ¶ 9, Ex. H (Meet and Confer Letter), ¶ 10, Ex. I  
6 (Response to Meet and Confer Letter), ¶ 11 (Telephonic Meet and Confer Session).)  
7 Prometheus refused to provide further responses to any of the discovery at-issue.

8 Federal Rules of Civil Procedure 33, 34, and 36, permit a party to propound written  
9 interrogatories, requests for production and requests for admission, respectively. Further,  
10 pursuant to Federal Rule of Civil Procedure 37 and Central District of California Local  
11 Rules 37-1 and 37-2, when a party responding to discovery fails to provide a substantive  
12 answer that responds to the discovery request and/or fails to produce responsive  
13 documents, the propounding party may file a motion to compel further responses and/or  
14 further production of documents in response thereto.

15 Here, Penske is moving to compel: (1) further responses to its first set of special  
16 interrogatories; (2) further responses to, and further production of documents responsive  
17 to, its first set of requests for production; and (3) further responses to its first set of  
18 requests for admission.

#### 19 **IV. PROMETHEUS' STATEMENT OF RELEVANT FACTS**

20 The local rules do not permit a statement of relevant facts, and Prometheus will not  
21 compound Penske's departure from the rules by doing the same. Relevant facts are noted  
22 in the argument sections below.

#### 23 **V. ARGUMENT: ISSUE #1: Prometheus's "Inspection" of Source Code** 24 **(Interrogatory 6)**

25 A. Penske's Position: Prometheus' Inspection of Nihaki's Copied Source Code  
26 is Easily Within the Scope of Permissible Discovery Because the Inspection  
27 Is Central to the Claim that Prometheus Intentional Copied Penske's Source  
28 Code



1                   1.     The Discovery Requests and Responses at-Issue

2           To investigate Prometheus' assertion in its initial disclosures that an outside vendor  
3 was responsible for copying Penske's source code, Penske propounded written discovery  
4 that includes Special Interrogatory No. 6, which states: "Describe any inspection that  
5 YOU performed of the computer code that the OFFENDING CONTRACTOR provided  
6 to YOU in connection with the revisions to the HOLLYWOOD REPORTER WEBSITE  
7 that YOU published in 2011."

8           Prometheus' Initial Disclosures already had hinted at the facts responsive to this  
9 interrogatory. Specifically, Prometheus named five of its employees who held job titles  
10 as Web Development Director, Chief Technology Officer, Developer, Project Manager,  
11 and Project Manager, all as having knowledge regarding the offending source code.

12          Despite the fact that Prometheus was willing to disclose some (or possibly all) of  
13 the persons with knowledge regarding the copying of Penske's source code, Prometheus  
14 engaged in gamesmanship in response to Penske's written discovery. Specifically,  
15 Prometheus stated, subject to objection, nothing more than that "the code was reviewed  
16 by one or more employees of Prometheus."

17          Further, Prometheus' objections were contrived and self-contradictory, and  
18 therefore, did not justify a refusal to provide a complete response. The following is  
19 Prometheus' response, with objections, stated in full:

20          "To the extent that Defendant performed any review of the code as a result of or in  
21 response to this lawsuit, Defendant objects to the Interrogatory as seeking information  
22 protected from disclosure by the attorney-client privilege, the work-product doctrine, and  
23 any other applicable privileges, immunities or protections from disclosure. Defendant  
24 further objects on the grounds that the phrase "describe any inspection" is vague, that the  
25 type of information sought is not appropriately obtained through interrogatories, and that  
26 any detailed information of the type requested includes Confidential Information that  
27 would only properly be produced under an appropriate confidentiality order. Subject to  
28 and without waiving the foregoing objections, and subject to and without waiving the



1 foregoing General Objections, Defendant stated that the code was reviewed by one or  
2 more employees of Prometheus."

3 Notably, Prometheus' two objections to disclosure of any pre-litigation investigation  
4 contradict each other in that Prometheus describes the request as "vague," but then  
5 complains that Penske supposedly cannot seek "detailed information of the type  
6 requested" without a protective order. Prometheus' second objection reveals that the first  
7 is contrived. Further, Prometheus' statement in its meet and confer response that its  
8 response is "complete and proper" reveals that Prometheus is not standing on the  
9 objection that a protective order is necessary. Given that Prometheus is refusing to  
10 disclose even the same scope of information included in its Initial Disclosures, the Court  
11 should infer that Prometheus' response constitutes gamesmanship.

## 12 2. Reasons to Compel Further Responses

13 In litigation in federal court, each party general has the right to discover "any  
14 nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P.  
15 26(b)(1).

16 Here, Penske's claim for copyright infringement includes an element of intent. In  
17 light of Prometheus' contention that Nihaki is solely responsible for the copying, Penske  
18 needs discovery of information relevant to show that Prometheus intended to copy  
19 Penske's source code. Further, the scope and extent of any review that Prometheus  
20 conducted is likely to show whether or not Prometheus actually knew of Nihaki's  
21 copying. For example, if Prometheus performed virtually no review of the source code or  
22 the resulting website interface, a jury might infer that Prometheus was turning a blind eye  
23 to the fact that Nihaki's finished product looked just like the website of Prometheus' top  
24 competitor. Thus, the discovery sought is directly relevant to the copyright claim in this  
25 case, and the Court should compel a further response to Special Interrogatory No. 6.

## 26 B. Prometheus' Position: The Interrogatory Response Was Proper



1 Penske's Interrogatory No. 6:<sup>1</sup>

2 Describe any inspection that YOU performed of the computer code that the  
3 OFFENDING CONTRACTOR provided to YOU in connection with the revisions  
4 to the HOLLYWOOD REPORTER WEBSITE that YOU published in 2011.

5 Prometheus's Response to Interrogatory No. 6:

6 To the extent that Defendant performed any review of the code as a result of or in  
7 response to this lawsuit, Defendant objects to this Interrogatory as seeking  
8 information protected from disclosure by the attorney-client privilege, the work  
9 product doctrine, and any other applicable privileges, immunities or protections  
10 from disclosure. Defendant further objects on the grounds that phrase "describe  
11 any inspection" is vague, that the type of information sought is not appropriately  
12 obtained through interrogatories, and that any detailed information of the type  
13 requested includes Confidential Information that could only properly be produced  
14 under an appropriate confidentiality order. Subject to and without waiving the  
15 foregoing objections, and subject to and without waiving the foregoing General  
16 Objections, Defendant states that the code was reviewed by one or more employees  
17 of Prometheus.

18 Prometheus's Points and Authorities on Issue 1:

19 Prometheus properly responded to this interrogatory by acknowledging that a  
20 review of the code took place and was conducted by its personnel. By pressing for a  
21 further response, Penske can only be asking for a detailed description of the  
22 communications and thought processes of all Prometheus's relevant personnel as they  
23 assessed the particulars of the code. This is not an appropriate use of an interrogatory.  
24 See Wright & Miller, *Federal Practice & Proc.* § 2174 ("[A] party cannot ordinarily be  
25 forced to prepare its opponent's case ... [and] interrogatories that require a party to make  
26 extensive investigations, research, or compilation or evaluation of data for the opposing  
27 party are in many circumstances improper."). Rather, the proper mechanism for  
28 obtaining such information would have been to take depositions of Prometheus's

1 With respect to each Issue in this Joint Stipulation, Penske has improperly woven the text of the  
2 disputed discovery requests and responses into its own argument; therefore, Prometheus has, at the  
3 beginning of its discussion of each issue, reprinted verbatim each disputed request and response,  
4 followed by Prometheus's contentions of fact and law, in compliance with Local Rule 37-2.1.



employees and to review the relevant written communications. *See, e.g., Halder v. Intern. Tel. & Tel. Co.*, 75 F.R.D. 657, 658 (E.D.N.Y. 1977) (refusing to compel response to burdensome interrogatories because “where the data is available to plaintiff ... by means of the appropriate discovery motion, this party should assume the burden of locating and assimilating the information he desires”). Yet Penske did not notice the deposition of a single Prometheus technical employee, despite the fact that Prometheus identified the relevant persons in its initial disclosures. In addition, Prometheus agreed, subject to entry of an appropriate protective order, to produce documents that would have allowed Penske to formulate and substantiate its own litigation position about what kind of inspection Prometheus performed of the code. Penske never responded to Prometheus’s final suggestion that the Parties involve the Court in reaching agreement on a protection order. Instead, Penske simply allowed the discovery period to expire. *See Sbardellati Decl.* ¶ 2 & Ex. A.

**VI. ARGUMENT: ISSUE #2: Budget for Website Redevelopment / Carousel**  
**(Interrogatories 10 and 11)**

A. Penske's Position: Prometheus Budget for the Project that Centered Around the Source Code that Prometheus Copied Is Similarly Relevant to Penske's Copyright Claim

1. The Discovery Requests and Responses at-Issue

Along the same lines as Special Interrogatory No. 6, Penske propounded additional written discovery seeking information that may be relevant to show that Prometheus was not a victim of Nihaki, but rather a co-conspirator. Special Interrogatory No. 10 and 11 seek information regarding the budgeting process for The Hollywood Reporter's redeveloped website. These interrogatories several functions. First, the interrogatories seek to determine whether the budget reflected any realistic possibility that Nahaki actually could have performed the required work to create from scratch the same material that Prometheus copied from Penske. Second, the interrogatories seek to determine the



1 scope of the entire project to redevelop The Hollywood Reporter website, which is  
 2 necessary to determine the portion of the entire project that is comprised by the source  
 3 code that Prometheus copied from Penske.<sup>2</sup>

4 Rather than substantively respond to the Interrogatories as Penske wrote them,  
 5 Prometheus responded that the Interrogatories were vague and unilaterally re-wrote the  
 6 Interrogatories as though they asked for the budget for the copied source code (which is  
 7 absurd) instead of the actual interrogatories, which sought information regarding the  
 8 budget to develop the new version of The Hollywood Reporter's website.

9 The following is the text of the interrogatories and the responses thereto:

10 Special Interrogatory No. 10 states: "IDENTIFY all COMMUNICATIONS in  
 11 which YOU participated that RELATE TO the expected and/or budgeted cost that  
 12 PROMETHEUS would incur to develop and/or launch a new version of the  
 13 HOLLYWOOD REPORTER WEBSITE."

14 The Response to Special Interrogatory No. 10 states: "Defendant objects to this  
 15 Interrogatory on the basis that the phrase 'new version of the Hollywood Reporter  
 16 website' is vague. Defendant is unable to determine with reasonable particularity what it  
 17 is being called upon to disclose. Subject to and without waiving the foregoing objections,  
 18 and subject to and without waiving the foregoing General Objections, and construing this  
 19 Interrogatory as calling for identification of communications relating to the expected  
 20 and/or budgeted cost that Prometheus would incur to develop and/or launch the THR  
 21 Module, Defendant states that it is not aware of any communications."

---

22  
 23  
 24  
 25 <sup>2</sup> Prometheus has argued that Penske will be unable to attribute specific profits earned by  
 26 Prometheus to the copying of Penske's source code. One method by which Penske can  
 27 make that showing is to demonstrate the number of additional "hits" (and thus the amount  
 28 of additional revenue) Prometheus received as a result of the entire website  
 redevelopment, and then use surveys or other data to show the relative value of the  
 copied source code to the entire project.



1 Special Interrogatory No. 11 states: "State any amounts that YOU budgeted to  
2 spend to develop a new version of the HOLLYWOOD REPORTER WEBSITE in 2010  
3 or 2011."

4 The Response to Special Interrogatory No. 11 states: "Defendant objects that the  
5 request for 'all communications' that 'relate to' the specified subject is vague, overbroad,  
6 and unduly burdensome, that the information sought is not properly obtained through  
7 interrogatories, and that any detailed information of the type requested includes  
8 Confidential Information that would only properly be produced under an appropriate  
9 confidentiality order. " [Prometheus then copied the entire text of its response to Special  
10 Interrogatory No. 10, which is set forth above.]

11 After receiving these responses, the parties met and conferred in an attempt to  
12 reach a resolution. Penske explained that it did not ask for the budget for the copied  
13 source code, which would have been an absurd interrogatory because Prometheus would  
14 not budget money for creating something that it planned to copy something wholesale  
15 from its competitor. As reflected in Prometheus' response to Penske's meet-and-confer  
16 letter, Prometheus is refusing to provide the information that Penske actually requested  
17 on the grounds that "Penske's requests for discovery regarding unrelated projects, that  
18 took place in different time periods, involved different persons, and were much larger in  
19 scope are clearly not supportable." (Stiglitz Decl. ¶ 10, Ex. I (Response to Meet and  
20 Confer Letter).)

## 21 2. Reasons to Compel a Further Response

22 Prometheus' budget for redeveloping its website is relevant for two reasons. First,  
23 as above, Prometheus' budget is relevant to show its intent to copy Penske's work. To the  
24 extent Prometheus did not anticipate spending a substantial portion of its website  
25 redevelopment budget on the key feature of the website's homepage, the jury may infer  
26 that Prometheus was intending to simply copy that design from Penske (just as Nihaki  
27 ultimately did on Prometheus' behalf). Second, Prometheus' budget is relevant to  
28 establish the amount of damages.



1 Congress explicitly provides for two distinct monetary remedies for copyright  
 2 infringement – actual damages and recovery of wrongful profits. See 17 U.S.C. § 504(b)  
 3 ("The copyright owner is entitled to recover the actual damages suffered by him or her as  
 4 a result of the infringement, and any profits of the infringer that are attributable to the  
 5 infringement and are not taken into account in computing the actual damages. In  
 6 establishing the infringer's profits, the copyright owner is required to present proof only  
 7 of the infringer's gross revenue, and the infringer is required to prove his or her  
 8 deductible expenses and the elements of profit attributable to factors other than the  
 9 copyrighted work."); see also Polar Bear Prods. v. Timex Corp., 2004 U.S. App. LEXIS  
 10 22131 (9th Cir. 2004).

11 Further, courts are liberal in granting discovery regarding copyright infringement  
 12 damages consisting of the defendant's wrongful profits. See, e.g., Cockburn v. SWS  
 13 Indus., 2012 U.S. Dist. LEXIS 48632, 10-11 (W.D. Wash. 2012) (granting motion to  
 14 compel financial information to prove actual damages arising from alleged infringement);  
 15 Sys. Am. v. Rockwell Software, Inc., 2007 U.S. Dist. LEXIS 43677 (N.D. Cal. 2007)  
 16 (granting motion to compel as to requests for production of financial information on  
 17 grounds material is *discoverable* even if not "recoverable at trial on a full record.");  
 18 Excelligence Learning Corp. v. Oriental Trading Co., 2004 U.S. Dist. LEXIS 28125, 25-  
 19 26 (N.D. Cal. 2004) (granting motion to compel as to information related to defendant's  
 20 profits on infringing products).

21 Here, Prometheus' budget is relevant to show either type of allowable damage. If  
 22 Prometheus did budget a reasonable sum for the creation of its website homepage and  
 23 then Prometheus actually saved that money by having Nihaki copy the key feature of one  
 24 of Penske's website homepages, then the budget provides a reasonable basis for  
 25 calculating actual damages in the form of a reasonable royalty. Alternatively, the same  
 26 data is relevant to show the amount of Prometheus' profits that are subject to  
 27 disgorgement. Specifically, the jury could award disgorgement damages by calculating  
 28 the portion of the Prometheus' increased advertising revenue attributable to website's



1 homepage. The jury could apportion the advertising revenue by assuming that the  
2 amount of the budget of each improvement for the website is proportional to the overall  
3 increase in advertising revenue from the redevelopment effort.

4 For the foregoing reason, the Court should order Prometheus to respond to Special  
5 Interrogatory No. 10-11 regarding the budgeting process for the redevelopment of The  
6 Hollywood Reporter website.

7 B. Prometheus's Position: Prometheus Appropriately Answered the  
8 Interrogatory.

9 Interrogatory No. 10:

10 IDENTIFY all COMMUNICATIONS in which YOU participated that RELATE  
11 TO the expected and/or budgeted cost that PROMETHEUS would incur to develop  
12 and/or launch a new version of the HOLLYWOOD REPORTER WEBSITE.

13 Response to Interrogatory No. 10:

14 Defendant objects to this Interrogatory on the grounds that the request for "all  
15 communications" that "relate to" the specified subject is vague, overbroad and  
16 unduly burdensome, that the type of information sought is not appropriately  
17 obtained through interrogatories, and that any detailed information of the type  
18 requested includes Confidential Information that could only properly be produced  
19 under an appropriate confidentiality order. Defendant objects to this Interrogatory  
20 on the basis that the phrase "new version of the Hollywood Reporter website" is  
21 vague. Defendant is unable to determine with reasonable particularity what it is  
22 being called upon to disclose. Subject to and without waiving the foregoing  
23 objections, and subject to and without waiving the foregoing General Objections,  
24 and construing this Interrogatory as calling for identification of communications  
25 relating to the expected and/or budgeted cost that Prometheus would incur to  
26 develop and/or launch the THR Module, Defendant states that it is not aware of  
27 any such communications.

28 Interrogatory No. 11:

State any amounts that YOU budgeted to spend to develop a new version of the  
HOLLYWOOD REPORTER WEBSITE in 2010 or 2011.



1 Response to Interrogatory No. 11:

2 Defendant objects on the basis that the phrase “new version of the Hollywood  
3 Reporter website” is vague. Defendant is unable to determine with reasonable  
4 particularity what it is being called upon to disclose. Defendant also objects on the  
5 grounds that the Interrogatory is overbroad and unduly burdensome, and that any  
6 detailed information of the type requested includes Confidential Information that  
7 could only properly be produced under an appropriate confidentiality order.  
8 Subject to and without waiving the foregoing objections, and subject to and  
9 without waiving the foregoing General Objections, and construing this  
10 Interrogatory as calling for amounts Defendant budgeted to spend to develop the  
11 THR Module, Defendant states that it did not budget a particular amount for that  
12 task.

13 Prometheus’s Points and Authorities on Issue 2:

14 Penske has no basis for requesting discovery of information about the budget for  
15 THR’s general website redevelopment project, which was carried out from June 2010 to  
16 October 2010 – nearly a year before the carousel project. The two projects have no  
17 relationship to one another. As set forth in the accompanying Declaration of Manish M.  
18 Shah, the project actually at issue in this case – the addition of a “carousel” feature for  
19 THR’s homepage – was a routine assignment too small to even have a budget, and was  
20 begun long after the completion of the general revamping of the website. *See* Shah Decl.  
21 ¶¶ 2-3. Prometheus has answered Penske’s Interrogatories 10 and 11 with respect to the  
22 carousel project. There is no conceivable reason to allow Penske to discover information  
23 about the budget of an entirely separate project.

24 The cases that Penske cites have no bearing on the dispute over Interrogatories 10  
25 and 11. Those cases address when the court will allow discovery of evidence to support a  
26 claim of indirect profits gained from copyright infringement. Penske’s request for budget  
27 information relating to Prometheus’s separate website redesign project in no way relates  
28 to whether Prometheus earned any profits from the carousel code eight months later.  
Likewise, Penske makes an argument about increased advertising revenue, but this  
argument is simply inapplicable to Interrogatories 10 and 11, which do not ask about



1 advertising revenue, but rather ask about Prometheus's budget.

2 **VI. ARGUMENT: ISSUE #3 – Amount Actually Spent on Website**

3 **Redevelopment Project (Interrogatory 12)**

4 A. Penske's Position: Information Regarding the Actual Cost for the Website  
 5 Redevelopment Project Is Relevant for the Same Reasons

6 1. The Discovery Request and Response at-Issue

7 Along the same lines as Special Interrogatory No. 10-11, Penske propounded  
 8 additional discovery that sought the actual (as opposed to budgeted) costs of the project,  
 9 to determine whether variances between the actual and budgeted costs would have raised  
 10 red flags. Specifically, Special Interrogatory No. 12 states: "State any amounts that YOU  
 11 actually spent to develop the version of the HOLLYWOOD REPORTER WEBSITE,  
 12 including without limitation the homepage for that website, that YOU published in 2011  
 13 and that included the THR MODULE."

14 Prometheus responded as follows:

15 "Defendant objects to this Interrogatory on the basis that the phrase 'new version of  
 16 the Hollywood Reporter website . . . that you published in 2011' is vague. Defendant is  
 17 unable to determine with reasonable particularity what it is being called upon to disclose.  
 18 Defendant also objects on the grounds that the Interrogatory is overbroad and unduly  
 19 burdensome, and that the information sought is not properly obtained through  
 20 interrogatories, and that any detailed information of the type requested includes  
 21 Confidential Information that would only properly be produced under an appropriate  
 22 confidentiality order. Subject to and without waiving the foregoing objections, and  
 23 subject to and without waiving the foregoing General Objections, and construing this  
 24 Interrogatory as calling for the amount Defendant spent to develop the THR Module, and  
 25 Defendant states that it did not segregate and 'actually spen[d]' any funds on that  
 26 particular project."



1 As with Special Interrogatory No. 10-11, this response purposefully evades the  
2 actual interrogatory that Penske propounded.

3 2. Reasons to Compel a Further Response

4 The Court should compel Prometheus to provide information responsive to Special  
5 Interrogatory No. 12 regarding the actual costs for redeveloping The Hollywood  
6 Reporter's website for the same reasons as stated in the section above regarding the  
7 budgeted costs.

8 B. Prometheus's Position: Prometheus Fully Answered the Interrogatory as far  
9 as it Could Conceivably Relate to the Carousel and Penske's Copyright  
10 Claim.

11 Interrogatory No. 12:

12  
13 State any amounts that YOU actually spent to develop the version of the  
14 HOLLYWOOD REPORTER WEBSITE, including without limitation the  
15 homepage for that website, that YOU published in 2011 and that included the THR  
MODULE.

16 Response to Interrogatory No. 12:

17 Defendant objects on the basis that the phrase "the version of the Hollywood  
18 Reporter website ... that you published in 2011" is vague. Defendant is unable to  
19 determine with reasonable particularity what it is being called upon to disclose.  
20 Defendant also objects on the grounds that the Interrogatory is overbroad and  
21 unduly burdensome, and that any detailed information of the type requested  
22 includes Confidential Information that could only properly be produced under an  
23 appropriate confidentiality order. Subject to and without waiving the foregoing  
24 objections, and subject to and without waiving the foregoing General Objections,  
and construing this Interrogatory as calling for the amount Defendant spent to  
develop the THR Module, and Defendant states that it did not segregate and  
"actually spen[d]" any funds on that particular project.

25 Prometheus's Points and Authorities on Issue 3:

26 This Issue presents the same question as the last, and Penske's motion should be  
27 denied with respect to this Issue for the same reason: the amounts Prometheus spent on  
28



its website redesign in 2010 have nothing to do with the carousel project, which was carried out in August 2011 (*see* Shah Decl. ¶¶ 2-3), and which is the entire basis of Penske's copyright claim. Again, Penske tries to justify its position by incorrectly claiming that the earlier project "centered around" the copying of source code by Mr. Ali – this is simply not the case, as the projects were not related. *Id.*

**VII. ARGUMENT: ISSUE #4 – Communications with Nihaki (Interrogatories 13 and 15)**

**A. Penske's Position: Prometheus Communications with Nihaki Are Plainly Relevant**

**1. The Discovery Requests and Responses at-Issue**

Along the same lines, Penske also propounded Special Interrogatory No. 13 and 15. These interrogatories seek communications with Nihaki to determine whether Prometheus and Nihaki had an understanding that Nihaki generally should, or should in this instance, copy material from one of Prometheus' competitors.

Special Interrogatory No. 15 is the narrower of the two requests. It states: IDENTIFY all COMMUNICATIONS between YOU and the OFFENDING CONTRACTOR that RELATE TO the creation, modification, revision, development, design, implementation, or programming of the new version of the HOLLYWOOD REPORTER WEBSITE that YOU published in 2011 and that contained the THR MODULE.

Prometheus responded as follows:

"Subject to and without waiving the foregoing General Objections, Defendant objects to this Interrogatory on the grounds that the request for 'all communications' that 'relate to' the specified subject is vague, overbroad and unduly burdensome, and that the type of information sought is not appropriately obtained through interrogatories. Defendant objects to this Interrogatory on the grounds that the phrase 'new version of the



1 Hollywood Reporter website' is vague, and that, if it were to be produced in spite of these  
2 objections, such information includes Confidential Information that would only properly  
3 be produced under an appropriate confidentiality order. To the extent this Interrogatory  
4 calls for communications in the form of documents, Defendant objects on the ground that  
5 this Interrogatory is duplicative of Plaintiff's document request number 23."

6 Special Interrogatory No. 13 seeks similar communication for a longer time frame.  
7 Specifically, it states: "IDENTIFY all COMMUNICATIONS between YOU and the  
8 OFFENDING CONTRACTOR in the last five (5) years that RELATE TO the potential  
9 or actual provision of services to create, modify, revise, develop, design, implement, or  
10 program any webpage or website."

11 Prometheus responded as follows:

12 "Subject to and without waiving the foregoing General Objections, to the extent  
13 that this Interrogatory related to communications that were the result of or in response to  
14 this lawsuit, Defendant objects to this Interrogatory as seeking information protected  
15 from disclosure by the attorney-client privilege, the work-product doctrine, and any other  
16 applicable privileges, immunities or protections from disclosure. Defendant also objects  
17 to this Interrogatory on the grounds that the request for 'all communications' that 'relate  
18 to' the specified subject is vague, overbroad and unduly burdensome, that the type of  
19 information sought is not appropriately obtained through interrogatories. Defendant  
20 objects to this Interrogatory on the grounds that the vast majority of Communications  
21 implicated are irrelevant to any claim or defense in this lawsuit, and that, if it were to be  
22 produced in spite of these objections, such information includes Confidential Information  
23 that would only properly be produced under an appropriate confidentiality order. To the  
24 extent this Interrogatory calls for communications in the form of documents, Defendant  
25 objects on the ground that this Interrogatory is duplicative of Plaintiff's document request  
26 number 23."

27 During the meet and confer session, Prometheus took the position that it had  
28 minimal communications with Nihaki and therefore that the issue was largely moot.



1 Penske reiterated that it is entitled to receive information regarding whatever  
 2 communications actually did occur because Nihaki's work is directly at issue in the  
 3 complaint.

## 4 2. Reasons for Compelling a Further Response

5 The Court should compel Prometheus to identify all of its communications with  
 6 Nihaki because those are the communications central to Penske's claim for copyright  
 7 infringement. Special Interrogatory No. 15 is particularly tailored to the dispute here  
 8 because it seeks only communications regarding the specific project during which Nihaki  
 9 stole Penske's source code. Thus, that interrogatory seeks the communications most  
 10 likely to reveal Prometheus' complicity in Nihaki's conduct. Prometheus' excuse that it  
 11 did not engage in many such communications is no excuse for refusing to identify the  
 12 communications that did occur. Special Interrogatory No. 13 seeks communications  
 13 between Prometheus and Nihaki for a longer period of time to determine whether they  
 14 had an established relationship in which Nihaki performed web development services,  
 15 and if so, whether they had an understanding regarding Prometheus' tolerance for copying  
 16 the design or source code of its competitors. The broader scope of emails that Penske  
 17 seeks in this interrogatory are relevant to show Prometheus' modus operandi for hiring  
 18 this particular web designer to copy the intellectual property of competitors. Thus, the  
 19 Court should compel a further response.

20 B. Prometheus's Position: The Interrogatories Are Vastly Overbroad and Call  
 21 for Information Having Nothing to do with the Carousel or Penske's  
 22 Copyright Cause of Action

### 23 Interrogatory No. 13:

24 IDENTIFY all COMMUNICATIONS between YOU and the OFFENDING  
 25 CONTRACTOR in the last five (5) years that RELATE TO the potential or actual  
 26 provision of services to create, modify, revise, develop, design, implement, or  
 27 program any webpage or website.

### 28 Response to Interrogatory No. 13:



1 Subject to and without waiving the foregoing General Objections, to the extent that  
 2 this Interrogatory relates to communications that were the result of or in response  
 3 to this lawsuit, Defendant objects to this Interrogatory as seeking information  
 4 protected from disclosure by the attorney-client privilege, the work product  
 5 doctrine, and any other applicable privileges, immunities or protections from  
 6 disclosure. Defendant also objects to this Interrogatory on the grounds that the  
 7 request for "all communications" that "relate to" the specified subject is vague,  
 8 overbroad and unduly burdensome, that the type of information sought is not  
 9 appropriately obtained through interrogatories. Defendant objects to this  
 10 Interrogatory on the grounds that the vast majority of the Communications  
 11 implicated are irrelevant to any claim or defense in this lawsuit, and that, if it were  
 12 to be produced at all in spite of the foregoing objections, such information includes  
 Confidential Information that could only properly be produced under an  
 appropriate confidentiality order. To the extent that this Interrogatory calls for  
 communications in the form of documents, Defendant objects on the ground that  
 this Interrogatory is duplicative of Plaintiff's document requests number 22-26.

13 Interrogatory No. 15:

14 IDENTIFY all COMMUNICATIONS between YOU and the OFFENDING  
 15 CONTRACTOR that RELATE TO the creation, modification, revision,  
 16 development, design, implementation, or programming of the new version of the  
 17 HOLLYWOOD REPORTER WEBSITE that YOU published in 2011 and that  
 contained the THR MODULE.

18 Response to Interrogatory No. 15:

19 Subject to and without waiving the foregoing General Objections, Defendant  
 20 objects to this Interrogatory on the grounds that the request for "all  
 21 communications" that "relate to" the specified subject is vague, overbroad and  
 22 unduly burdensome, and that the type of information sought is not appropriately  
 23 obtained through interrogatories. Defendant also objects on the grounds that the  
 24 phrase "new version of the Hollywood Reporter website" is vague, and that, if it  
 25 were to be produced at all in spite of the foregoing objections, the requested  
 26 information includes Confidential Information that could only properly be  
 27 produced under an appropriate confidentiality order. To the extent that this  
 28 Interrogatory calls for communications in the form of documents, Defendant  
 objects on the ground that this Interrogatory is duplicative of Plaintiff's document  
 requests number 22-26.



1 Prometheus's Points and Authorities on Issue 4:

2       Penske's request to identify "all communications" with Mr. Ali that relate to any  
3 website related services Mr. Ali performed would entail recounting virtually every  
4 written and oral remark that Mr. Ali made in the year that he performed work for  
5 Prometheus. *See* Shah Decl. ¶ 2. The proper discovery mechanisms for identifying any  
6 relevant communications in this regard would have been depositions and discovery of  
7 documents. *See, e.g., Halder*, 75 F.R.D. at 658. Prometheus identified Mr. Ali in its  
8 initial disclosures. If Penske wished to learn about "all communications" between him  
9 and Prometheus that related to any work he did on the THR website, or "all  
10 communications" in which he ever engaged in connection with the carousel project,  
11 Penske should have deposed him. If Penske wished to review written communications,  
12 Penske should have responded to Prometheus's suggestion about reaching an agreement  
13 on a protective order. *See* Sbardellati Decl. ¶ 2 & Ex. A. Now, discovery is closed.  
14 Requiring Prometheus to assemble and identify "all communications" involving Mr. Ali  
15 is an inappropriate use of an interrogatory. Prometheus cannot realistically be expected  
16 to recreate, in an interrogatory, blow-by-blow discussions in which Mr. Ali engaged, the  
17 vast majority of which had nothing to do with this case. *See* Wright & Miller, *Federal*  
18 *Practice & Proc.* § 2174 ("[A] party cannot ordinarily be forced to prepare its opponent's  
19 case ... [and] interrogatories that require a party to make extensive investigations,  
20 research, or compilation or evaluation of data for the opposing party are in many  
21 circumstances improper."); *Halder*, 75 F.R.D. at 658 ("[W]here the data is available to  
22 plaintiff ... by means of the appropriate discovery motion, this party should assume the  
23 burden of locating and assimilating the information he desires.").

24       In addition, the Interrogatories are obviously overbroad. Mr. Ali worked full time  
25 at Prometheus's office for approximately one year, from October 2010 until shortly after  
26 this lawsuit was filed on September 14, 2011. *See* Shah Decl. ¶ 2. During that time, his  
27 day-to-day work was performing website projects for the various websites that  
28 Prometheus owns (which include billboard.com, adweek.com, hollywoodreporter.com



and others). *Id.* Penske's Interrogatories encompass all of those communications. Even if this were a document request, as opposed to an Interrogatory, to "identify" those hundreds of thousands of communications would be unduly burdensome and would call for a significant amount of irrelevant information. *See Womack v. Metro. Transit Sys.*, 2010 WL 2178962, at \*2 (S.D. Cal. 2010) (denying request for plaintiff's daily work logs, as "the day-to-day detail of what Plaintiff did while at work for two years is an overly-broad category of information that is not relevant to the core issues in this lawsuit").

One third-party computer programmer mistakenly copied code on a single project – this does not justify a fishing expedition – via an interrogatory, no less – into every website-related communication Prometheus ever had with him or his employer.<sup>3</sup>

#### **VIII. ARGUMENT: ISSUE #5 – Other Contractors Who Have Performed Web Services for Prometheus (Interrogatory 14)**

A. Penske's Position: The Court Should Compel Prometheus to Provide Information Regarding Other Contractors Who It Has Hired to Perform Similar Services Because the Decision to Hire a Less Reputable Web Designer Is Relevant to Signal Prometheus' Intent to Engage in Misconduct

##### 1. The Discovery Requests and Responses at-Issue

Penske also propounded Special Interrogatory No. 14, seeking information regarding other computer programmers who Prometheus has hired for web development projects. This was targeted to determine, among other things, whether Prometheus

---

<sup>3</sup> Penske claims that Prometheus took the position during the meet-and-confer that Prometheus had minimal communications with Nihaki, and that Prometheus "did not engage in many such communications" with Nihaki. This is false; Prometheus never took that position. Prometheus communicated with Mr. Ali of Nihaki virtually every day for a year. *See Shah Decl.* ¶ 2.



1 regularly uses more reputable vendors and specifically chose Nihaki because it merely  
2 wanted Nihaki to copy Penske's work product.

3 Special Interrogatory No. 14 states: "IDENTIFY any and all PERSONS that have  
4 provided services to YOU to create, modify, revise, develop, design, implement, or  
5 program any webpage or website in the last five (5) years."

6 Prometheus responded as follows:

7 "Subject to and without waiving the foregoing General Objections, Defendant  
8 objects to this Interrogatory on the grounds that the vast majority of Communications  
9 implicated are irrelevant to any claim or defense in this lawsuit. Defendant also objects  
10 on the basis that the Interrogatory is overbroad and unduly burdensome, and that, if it  
11 were to be produced in spite of these objections, such information includes Confidential  
12 Information that would only properly be produced under an appropriate confidentiality  
13 order. To the extent this Interrogatory calls for communications in the form of  
14 documents, Defendant objects on the ground that this Interrogatory is duplicative of  
15 Plaintiff's document request number 23."

16 Prometheus' position did not change after meeting and conferring.

17 2. Reasons to Compel a Further Response

18 For the same reasons set forth above, the Court should compel a response to  
19 Special Interrogatory No. 14, which seeks information that will help Penske educate the  
20 jury regarding Prometheus' options for hiring a web designer and will help Penske show  
21 the jury that Prometheus' specific choice of vendor for this project reflected an intent to  
22 seek less creative work.



1 B. Prometheus's Position: The Interrogatory Is Overbroad and Seeks  
 2 Information that Is Irrelevant to this Lawsuit

3 Interrogatory No. 14:

4  
 5 IDENTIFY any and all PERSONS that have provided services to YOU to create,  
 6 modify, revise, develop, design, implement, or program any webpage or website in  
 7 the last five (5) years.

8 Response to Interrogatory No. 14:

9 Subject to and without waiving the foregoing General Objections, Defendant  
 10 objects to this Interrogatory on the ground that the vast majority of the information  
 11 requested is irrelevant to any claim or defense in this lawsuit. Defendant also  
 12 objects on the basis that the Interrogatory is overbroad and responding would be  
 13 unduly burdensome, and that, if it were to be produced at all in spite of the  
 14 foregoing objections, such information includes Confidential Information that  
 15 could only properly be produced under an appropriate confidentiality order. To the  
 16 extent that this Interrogatory calls for communications in the form of documents,  
 17 Defendant objects on the ground that this Interrogatory is duplicative of Plaintiff's  
 18 document request number 23.

16 Prometheus's Points and Authorities on Issue 5:

17 Penske's Interrogatory 14 is overbroad. Prometheus employs a large department  
 18 of personnel who provide services related to websites. *See* Shah Decl. ¶ 4. As mentioned  
 19 above, Prometheus owns numerous websites in addition to THR's. *Id.* ¶ 1. Numerous  
 20 employees who had nothing to do with the carousel project would fall within Penske's  
 21 request. In addition, Prometheus has hired over the years, and continues to hire, a range  
 22 of vendors to work on computer projects. *See* Shah Decl. ¶ 4. To assemble a list of all of  
 23 these people and entities would be unduly burdensome; it would also be pointless, as the  
 24 only event of relevance is the creation of the carousel code. *See Halder*, 75 F.R.D. at 658  
 25 (answers to interrogatories requesting data on every computer programmer hired by large  
 26 conglomerate in previous seven years would not be compelled in view of interrogatories'  
 27 burdensomeness). Prometheus identified the individuals likely to have relevant  
 28



1 knowledge in its initial disclosures, and Penske never attempted to depose them.

2 Penske only half-heartedly attempts to justify this request, claiming that it "seeks  
3 information that will help Penske educate the jury regarding Prometheus's options for  
4 hiring a web designer and will help Penske show the jury that Prometheus's specific  
5 choice of vendor for this project reflected an intent to seek less creative work." This is  
6 sheer speculation, counterfactual, and far too attenuated to support the discovery sought.

7 **IX. ARGUMENT: ISSUE #6 – Gross Revenues and Expenses from Website and**  
8 **from homepage, for three weeks that carousel was up (requests for Production 56-**  
9 **59)**

10 A. Penske's Position: The Court Should Compel Prometheus to State the  
11 Revenue and Costs Associated with the Redeveloped Website Because that  
12 Is the Only Data Available to Show the Amount of Profits Subject to  
13 Disgorgement

14 1. The Discovery Requests and Responses at-Issue

15 Penske is seeking discovery regarding Prometheus' wrongfully obtained profits  
16 resulting from Prometheus' copyright infringement. Given the undisputed fact that  
17 Prometheus redeveloped its website in large part by using a word-for-word copy of  
18 Penske's key source code, Penske has requested information regarding Prometheus'  
19 wrongfully obtained profits resulting from Prometheus' copyright infringement.

20 Penske's Requests for Production No. 56-59 all directly relate to this issue.

21 Requests for Production No. 56 states, "Produce all DOCUMENTS that RELATE  
22 TO any and all amounts of gross revenue YOU obtained from the HOLLYWOOD  
23 REPORTER WEBSITE during the entire time that the HOLLYWOOD REPORTER  
24 WEBSITE included the THR MODULE."

25 Requests for Production No. 57 states, "Produce all DOCUMENTS that RELATE  
26 TO any and all amounts of expenses YOU incurred in connection YOUR operation of the  
27



1 HOLLYWOOD REPORTER WEBSITE during the entire time that the HOLLYWOOD  
2 REPORTER WEBSITE included the THR MODULE."

3 Requests for Production No. 58 states, "Produce all DOCUMENTS that RELATE  
4 TO any and all amounts of gross revenue YOU obtained from the homepage of the  
5 HOLLYWOOD REPORTER WEBSITE (i.e. the webpage with the uniform resource  
6 locator (URL) <http://www.hollywoodreporter.com>) during the entire time that the  
7 HOLLYWOOD REPORTER WEBSITE included the THR MODULE."

8 Requests for Production No. 59 states, "Produce all DOCUMENTS that RELATE  
9 TO any and all amounts of expenses YOU incurred in connection with YOUR operation  
10 of the homepage of the HOLLYWOOD REPORTER WEBSITE (i.e. the webpage with  
11 the uniform resource locator (URL) <http://www.hollywoodreporter.com>) during the entire  
12 time that the HOLLYWOOD REPORTER WEBSITE included the THR MODULE."

13 In response to each of the foregoing requests, Prometheus refused to respond based  
14 upon the same objections. Specifically, Prometheus responded:

15 "Subject to and without waiving the foregoing General Objections, Defendant  
16 objects that this Document Request is vague, overbroad and calls for documents that have  
17 no relevance to the case and would be unduly burdensome to collect and produce.  
18 Defendant also objects to this Document Request because the information requested is  
19 not relevant unless and until Plaintiff has proved that Defendant is liable and that Plaintiff  
20 has suffered damages, and even if Plaintiff offered such proof, the documents requested  
21 are not relevant to any rational calculation of damages. Defendant also objects to this  
22 Request because it calls for documents that, if they were to be produced in spite of the  
23 foregoing objections, are of the type that would include Confidential Information that  
24 would only properly be produced under an appropriate confidentiality order."

25 Notably, Prometheus has not provided any information regarding the  
26 supposed burden associated with producing its revenue or cost data for the brief period  
27 during which Prometheus admittedly used Penske's copyrighted source code for the key  
28 portion of its redeveloped website. Instead, Prometheus stated during the meet and



1 confer process that the revenue and cost data it already has compiled are for longer  
2 periods of time.

## 3 2. Reasons to Compel a Further Response

4 During the meet and confer process, Prometheus contended that revenue and cost  
5 data for the website redevelopment project is not discoverable simply because that project  
6 was larger than the scope of Penske's copyrighted source code that Prometheus copied.  
7 Prometheus' position is based on the inapposite case law, such as the Polar Bear Products  
8 case, which relates to whether certain evidence was sufficient (generally by itself) to  
9 warrant a plaintiff's verdict after trial. Here, however, the issue for the Court to decide is  
10 not whether the discovery sought is sufficient to support a verdict, but rather, whether the  
11 information sought is discoverable. Numerous courts already have reached that issue and  
12 concluded that broad revenue and expense data is discoverable, especially when, as here,  
13 there is no more refined data available. See, e.g., Cockburn v. SWS Indus., 2012 U.S.  
14 Dist. LEXIS 48632, 10-11 (W.D. Wash. 2012) (granting motion to compel financial  
15 information to prove actual damages arising from alleged infringement); Sys. Am. v.  
16 Rockwell Software, Inc., 2007 U.S. Dist. LEXIS 43677 (N.D. Cal. 2007) (granting  
17 motion to compel as to requests for production of financial information on grounds  
18 material is *discoverable* even if not "recoverable at trial on a full record."); Excelligence  
19 Learning Corp. v. Oriental Trading Co., 2004 U.S. Dist. LEXIS 28125, 25-26 (N.D. Cal.  
20 2004) (granting motion to compel as to information related to defendant's profits on  
21 infringing products).

22 For the foregoing reasons, the Court should compel Prometheus to produce all non-  
23 privileged documents responsive to Penske's Requests for Production No. 56-59.

### 24 B. Prometheus' Position:

#### 25 Document Request No. 56:

26 Produce all DOCUMENTS that RELATE TO any and all amounts of gross  
27 revenue YOU obtained from the HOLLYWOOD REPORTER WEBSITE during  
28 the entire time that the HOLLYWOOD REPORTER WEBSITE included the THR



1 MODULE.

2 Response to Document Request No. 56:

3 Subject to and without waiving the foregoing General Objections, Defendant  
4 objects that this Document Request is vague, overbroad and calls for documents  
5 that have no relevance to the case and would be unduly burdensome to collect and  
6 produce. Defendant also objects to this Document Request because the  
7 information requested is not relevant unless and until Plaintiff has proved that  
8 Defendant is liable and that Plaintiff has suffered damages, and even if Plaintiff  
9 offered such proof, the documents requested are not relevant to any rational  
10 calculation of damages. Defendant also objects to this Request because it calls for  
documents that, if they were to be produced in spite of the foregoing objections,  
are of a type that would include Confidential Information that could only properly  
be produced under an appropriate confidentiality order.

11 Document Request No. 57:

12  
13 Produce all DOCUMENTS that RELATE TO any and all amounts of expenses  
14 YOU incurred in connection [sic] YOUR operation of the HOLLYWOOD  
15 REPORTER WEBSITE during the entire time that the HOLLYWOOD  
REPORTER WEBSITE included the THR MODULE.

16 Response to Document Request No. 57:

17 Subject to and without waiving the foregoing General Objections, Defendant  
18 objects that this Document Request is vague, overbroad and calls for documents  
19 that have no relevance to the case and would be unduly burdensome to collect and  
20 produce. Defendant also objects to this Document Request because the  
21 information requested is not relevant unless and until Plaintiff has proved that  
22 Defendant is liable and that Plaintiff has suffered damages, and even if Plaintiff  
23 offered such proof, the documents requested are not relevant to any rational  
24 calculation of damages. Defendant also objects to this Request because it calls for  
documents that, if they were to be produced in spite of the foregoing objections,  
are of a type that would include Confidential Information that could only properly  
be produced under an appropriate confidentiality order.

25 Document Request No. 58:

26  
27 Produce all DOCUMENTS that RELATE TO any and all amounts of gross  
28 revenue YOU obtained from the homepage of the HOLLYWOOD REPORTER



1 WEBSITE (i.e. the webpage with the uniform resource locator (URL)  
2 <http://www.hollywoodreporter.com>) during the entire time that the HOLLYWOOD  
3 REPORTER WEBSITE included the THR MODULE.

4 Response to Document Request No. 58:

5 Subject to and without waiving the foregoing General Objections, Defendant  
6 objects that this Document Request is vague, overbroad and calls for documents  
7 that have no relevance to the case and would be unduly burdensome to collect and  
8 produce. Defendant also objects to this Document Request because the  
9 information requested is not relevant unless and until Plaintiff has proved that  
10 Defendant is liable and that Plaintiff has suffered damages, and even if Plaintiff  
11 offered such proof, the documents requested are not relevant to any rational  
12 calculation of damages. Defendant also objects to this Request because it calls for  
13 documents that, if they were to be produced in spite of the foregoing objections,  
14 are of a type that would include Confidential Information that could only properly  
15 be produced under an appropriate confidentiality order.

16 Document Request No. 59:

17 Produce all DOCUMENTS that RELATE TO any and all amounts of expenses  
18 YOU incurred in connection with YOUR operation of the homepage of the  
19 HOLLYWOOD REPORTER WEBSITE (i.e. the webpage with the uniform  
20 resource locator (URL) <http://www.hollywoodreporter.com>) during the entire time  
21 that the HOLLYWOOD REPORTER WEBSITE included the THR MODULE.

22 Response to Document Request No. 59:

23 Subject to and without waiving the foregoing General Objections, Defendant  
24 objects that this Document Request is vague, overbroad and calls for documents  
25 that have no relevance to the case and would be unduly burdensome to collect and  
26 produce. Defendant also objects to this Document Request because the  
27 information requested is not relevant unless and until Plaintiff has proved that  
28 Defendant is liable and that Plaintiff has suffered damages, and even if Plaintiff  
offered such proof, the documents requested are not relevant to any rational  
calculation of damages. Defendant also objects to this Request because it calls for  
documents that, if they were to be produced in spite of the foregoing objections,  
are of a type that would include Confidential Information that could only properly  
be produced under an appropriate confidentiality order.



Prometheus's Points and Authorities on Issue 6:

In these four requests, Penske seeks documents relating to all of THR's revenues and expenses for hollywoodreporter.com for the three-week period during which the carousel code at issue was used, *i.e.*, August 25 through September 14. To be clear, the copyright claim in this case relates solely to the way that content was organized on THR's homepage for three weeks. To the extent that Penske is seeking revenues and expenses associated with the website as a whole, Penske is off the mark: the lawsuit is about the carousel code on the homepage and not the entire site. Pressing to learn the full amount of revenues that hollywoodreporter.com generated during that three-week period may be interesting to Penske as a competitor, but it has no relevance to copyright damages.<sup>4</sup> To the extent that Penske is seeking revenue or expense data for the homepage, again it misses the mark – the only relevant issue is the carousel code on the homepage, not the entire homepage, which has a wide range of content and features. There is also an issue of burden: If Penske had bothered to depose any THR witnesses on these financial issues, it would have learned that revenue and expense data for the homepage itself simply is not maintained in the ordinary course, and any effort to create such data for use in this litigation would be a strained, artificial and difficult exercise.<sup>5</sup>

The cases that Penske cites do not suggest otherwise – in those cases, there was a plausible chance that the infringement provided the defendant with indirect profits – for example, because the infringing product was used to help market other products. Penske

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<sup>4</sup> In its argument on this point, Penske refers to the purportedly “undisputed fact that Prometheus redeveloped its website in large part by using a word-for-word copy of Penske’s key source code.” This is not undisputed – it is false. Penske is again conflating the website redevelopment project of 2010 with the unrelated carousel project in August 2011. In addition, Penske refers to the “revenue ... for the website redevelopment project.” Penske has not requested information about the “revenue ... for the website redevelopment project” – Penske has only requested information about revenues for the three-week period during which the carousel appeared on hollywoodreporter.com.

<sup>5</sup> Such information is also extremely competitively sensitive and, if the Court were to order Prometheus to produce it, Prometheus would request that such order be conditioned upon entry of a protective order adequately protecting Prometheus from competitive harm.



has offered no such plausible argument here, given the brevity of the appearance of the carousel and the fact that all the carousel code did was cause content to rotate across the page.

**X. ARGUMENT: ISSUE #7 – Recruitment of Employees (RFP 1-8, 10; RFA 1-5; Interrogatory 1); and “Hot News” Misappropriation (RFP 27-55; RFA 8-41; Interrogatory 16)**

A. Penske's Position: The Court Should Compel Prometheus to Respond to Discovery Regarding Its Intent to Unlawfully Compete with Penske

1. Discovery Requests and Responses at-Issue

a. Prometheus Refuses to Provide Discovery Regarding Its Recruitment of Penske's Employees Who Were Under Long-Term Contract

Penske propounded discovery regarding its allegation in the complaint that Prometheus' copying of Penske's website homepage is part of a concerted effort to unlawfully compete with Penske. Penske is seeking discovery that will reveal Prometheus' overall plan for competing with Penske, including discovery regarding Prometheus' attempts to poach Penske's employees who Prometheus knew were under long-term contracts. (Complaint ¶¶ 27-33.) The specific employees who Prometheus improperly attempted to recruit include Nikki Finke, Nellie Andreeva, Nic Paul, and Lynne Segall. Pursuing this allegation, Penske propounded Requests for Production No. 1-8, and 10, Requests for Admission No. 1-5, and Special Interrogatory No. 1.

The following is the text of the document requests at issue:

Request for Production No. 1 states: "Produce all DOCUMENTS that RELATE TO any effort by PROMETHEUS to recruit Nikki Finke to accept a position working with PROMETHEUS, including without limitation all COMMUNICATIONS between Todd Boehly and Nikki Finke on that subject.

Request for Production No. 2 states: "If YOU contend that YOU did not believe that Nikki Finke had an employment contract to work for PMC for a fixed term at any



1 time that YOU attempted to recruit Nikki Finke to accept a position working with  
2 PROMETHEUS, produce all DOCUMENTS that support that contention."

3 Request for Production No. 3 states: "Produce all DOCUMENTS that RELATE  
4 TO any job offer from PROMETHEUS to Nikki Finke."

5 Request for Production No. 4 states: "Produce all DOCUMENTS that RELATE  
6 TO any effort by PROMETHEUS to recruit Nellie Andreeva to accept a position working  
7 with PROMETHEUS."

8 Request for Production No. 5 states: "If YOU contend that YOU did not believe  
9 that Nellie Andreeva had an employment contract to work for PMC for a fixed term at  
10 any time that YOU attempted to recruit Nellie Andreeva to accept a position working  
11 with PROMETHEUS, produce all DOCUMENTS that support that contention."

12 Request for Production No. 6 states: "Produce all DOCUMENTS that RELATE  
13 TO any effort by PROMETHEUS to recruit Nic Paul to accept a position working with  
14 PROMETHEUS, including without limitation COMMUNICATIONS between Lori  
15 Burgess and Nic Paul regarding that subject."

16 Request for Production No. 7 states: "If YOU contend that YOU did not believe  
17 that Nic Paul had an employment contract to work for PMC for a fixed term at any time  
18 that YOU attempted to recruit Nic Paul to accept a position working with  
19 PROMETHEUS, produce all DOCUMENTS that support that contention."

20 Request for Production No. 8 states: "Produce all DOCUMENTS that RELATE  
21 TO any effort by PROMETHEUS to recruit Lynne Segall to accept a position working  
22 with PROMETHEUS."

23 Request for Production No. 10 states: "Produce all COMMUNICATIONS  
24 between PROMETHEUS (including without limitation Richard Beckman and Jimmy  
25 Finkelstein) and PMC (including without limitation Jay Penske) that RELATE TO any  
26 offer, proposal, and/or suggestion that PMC would enter into an agreement with  
27 PROMETHEUS to provide its news and/or feature content to PROMETHEUS."  
28



1 Prometheus summarily refused to respond to all document requests on this subject  
2 matter based on the following boilerplate response: "Subject to and without waiving the  
3 foregoing General Objections, Defendant objects to this Document Request as irrelevant  
4 to any claim or defense in this case. Defendant also objects to the request because it is  
5 vague, overbroad and unduly burdensome, and because it calls for documents that, if they  
6 were to be produced in spite of these objections, are of a type that would include  
7 Confidential Information that would only properly be produced under an appropriate  
8 confidentiality order."

9 The following is the text of Special Interrogatory No. 1, which is the only  
10 interrogatory at issue:

11 "IDENTIFY all COMMUNICATIONS in which YOU participated that RELATE  
12 TO any effort by PROMETHEUS to recruit Lynne Segall to accept a position working  
13 with PROMETHEUS"

14 Prometheus refused to respond to this interrogatory, stating: "Subject to and  
15 without waiving the foregoing General Objections, Defendant objects to this  
16 Interrogatory as irrelevant to any claim or defense in this case. Defendant objects to this  
17 Interrogatory on the grounds that the request for 'all communications' that 'relate to' the  
18 specified subject is vague, overbroad and unduly burdensome, and that the type of  
19 information sought is not appropriately obtained through interrogatories, and that, if it  
20 were to be produced in spite of these objections, such information Confidential  
21 Information that would only properly be produced under an appropriate confidentiality  
22 order."

23 The following is the text of the requests for admission at issue:

24 Request for Admission No. 1 states, "Admit that YOU recruited Nikki Finke to  
25 accept a position working with PROMETHEUS."

26 Request for Admission No. 2 states, "Admit that YOU recruited Nellie Andreeva  
27 to accept a position working with PROMETHEUS."



1 Request for Admission No. 3 states, "Admit that YOU recruited Nic Paul to accept  
2 a position working with PROMETHEUS."

3 Request for Admission No. 4 states, "Admit that YOU successfully recruited  
4 Lynne Segall to accept a position working with PROMETHEUS."

5 Request for Admission No. 5 states, "Admit that Lynne Segall disclosed to YOU  
6 that she had a fixed term employment contract with PMC prior to the time she accepted a  
7 position working with PROMETHEUS."

8 Prometheus summarily refused to respond to each of the requests for admission  
9 based on the following objections, "Without waiving any objections and without  
10 admitting any facts whatsoever, Defendant objects on the basis that this Request is not  
11 relevant to any claim or defense in this action. Defendant also objects on the ground that  
12 the Request seeks Confidential Information that Defendant could only provide under an  
13 appropriate confidentiality order."

14 b. Prometheus Refuses to Provide Discovery Regarding Its Practice of  
15 Monitoring Penske's Websites for the Purpose of Misappropriating  
16 Hot News

17 Prometheus' concerted effort to unlawfully compete with Penske also included a  
18 policy of instructing its employees to monitor Penske's websites for "hot news" that it  
19 could post on The Hollywood Reporter. Penske's evidence supporting this allegation  
20 consists of, among other things, dozens of time-stamped articles showing that The  
21 Hollywood Reporter routinely published the same information as Deadline Hollywood  
22 within minutes of the latter posting an article.

23 The allegations in the complaint regarding that Prometheus' concerted effort to  
24 unlawfully compete with PMC's websites include that Prometheus published articles on  
25 its Hollywood Reporter website that copied the substance of articles published on  
26 Deadline.com. (Complaint ¶¶ 34-38.)

27 Penske is seeking discovery that will further establish the existence of a policy at  
28 Prometheus of copying the substance, if not the word-for-word text, of Penske's articles



1 on the Deadline website. Prometheus' policy of copying Penske's articles tends to show  
2 that Prometheus encourages copying Penske's work product as a short cut for providing a  
3 service similar to that which Penske provides. Therefore, the discovery Penske  
4 propounded is relevant to the copyright infringement claim at issue here.

5 Pursuing this allegation, Penske propounded Requests for Production No. 27-55,  
6 Requests for Admission No. 8-41, and Special Interrogatory No. 16. Prometheus failed  
7 to respond or object to Request for Admission No. 41 (thereby waiving objection) and  
8 summarily refused to respond to the remaining requests.

9 Special Interrogatory No. 16, which is the only interrogatory at issue, merely seeks  
10 information supporting the allegations in Prometheus' answer to the complaint in this  
11 case. Specifically, it states:

12 State all facts that support the statement in the ANSWER that the similarity  
13 between the articles on DEADLINE and the HOLLYWOOD REPORTER WEBSITE  
14 identified in paragraph 34 of the COMPLAINT can be explained, in part or in whole, by  
15 the statement on page 6, lines 14-18 of the ANSWER that "THR and other entertainment  
16 news sites sometimes report on the same stories within a few minutes of each other,  
17 based on the same press releases or similar publicly available announcements from  
18 studios and other entertainment industry sources."

19 Prometheus responded as follows: "Subject to and without waiving the foregoing  
20 General Objections, Defendant objects to this Interrogatory as irrelevant to any claim or  
21 defense in this case. Defendant further objects on the grounds that the request for 'all  
22 facts' that support the statement is unduly burdensome and overly broad, and that the type  
23 of information sought is not appropriately obtained through interrogatories, and that, if it  
24 were to be produced in spite of these objections, such information Confidential  
25 Information that would only properly be produced under an appropriate confidentiality  
26 order."  
27  
28



1 After meeting and conferring, Prometheus stood by its position that it would not  
2 respond to any discovery regarding its policy of monitoring Penske's websites for the  
3 purpose of copying content because such information supposedly is irrelevant.

4 The following is the text of the document requests at issue:

5 Request for Production No. 27 states: "Produce all DOCUMENTS that RELATE  
6 TO any publicly available source (including without limitation any press release, any  
7 public announcement, or any article published on DEADLINE) of information YOU used  
8 in connection with writing and/or publishing the following article posted on the  
9 HOLLYWOOD REPORTER WEBSITE: Jennifer Lopez, Silvio Horta Sell Family  
10 Dramey to Fox, By Lacey Rose dated 9/13/2011."

11 Request for Production No. 28 states: "Produce all DOCUMENTS that RELATE  
12 TO any publicly available source (including without limitation any press release, any  
13 public announcement, or any article published on DEADLINE) of information YOU used  
14 in connection with writing and/or publishing the following article posted on the  
15 HOLLYWOOD REPORTER WEBSITE: NBC Entertainment's In-House Studio Gets  
16 New Name and Key Exec Promotions, By Marisa Guthrie dated 9/12/2011."

17 Request for Production No. 29 states: "Produce all DOCUMENTS that RELATE  
18 TO any publicly available source (including without limitation any press release, any  
19 public announcement, or any article published on DEADLINE) of information YOU used  
20 in connection with writing and/or publishing the following article posted on the  
21 HOLLYWOOD REPORTER WEBSITE: Ellen DeGeneres, Portia de Rossi Team for  
22 NBC Comedy, By Lesley Goldberg dated 9/9/2011."

23 Request for Production No. 30 states: "Produce all DOCUMENTS that RELATE  
24 TO any publicly available source (including without limitation any press release, any  
25 public announcement, or any article published on DEADLINE) of information YOU used  
26 in connection with writing and/or publishing the following article posted on the  
27 HOLLYWOOD REPORTER WEBSITE: Toronto 2011: Michael Fassbender's 'Shame'  
28 Sells to Fox Searchlight, By Borys Kit dated 9/9/2011."



1 Request for Production No.31 states, "Produce all DOCUMENTS that RELATE  
2 TO any publicly available source (including without limitation any press release, any  
3 public announcement, or any article published on DEADLINE) of information YOU used  
4 in connection with writing and/or publishing the following article posted on the  
5 HOLLYWOOD REPORTER WEBSITE: Samuel Goldwyn Grabs North American  
6 Rights to Diana Vreeland Doc, By Borys Kit dated 9/9/2011.

7 Request for Production No. 32 states, "Produce all DOCUMENTS that RELATE  
8 TO any publicly available source (including without limitation any press release, any  
9 public announcement, or any article published on DEADLINE) of information YOU used  
10 in connection with writing and/or publishing the following article posted on the  
11 HOLLYWOOD REPORTER WEBSITE: Russell Crowe in Negotiations to Star in 'Les  
12 Miserables', By Borys Kit dated 9/8/2011."

13 Request for Production No. 33 states, "Produce all DOCUMENTS that RELATE  
14 TO any publicly available source (including without limitation any press release, any  
15 public announcement, or any article published on DEADLINE) of information YOU used  
16 in connection with writing and/or publishing the following article posted on the  
17 HOLLYWOOD REPORTER WEBSITE: Lifetime Cancels 'The Protector,' By Lesley  
18 Goldberg dated 9/8/2011."

19 Request for Production No. 34 states, "Produce all DOCUMENTS that RELATE  
20 TO any publicly available source (including without limitation any press release, any  
21 public announcement, or any article published on DEADLINE) of information YOU used  
22 in connection with writing and/or publishing the following article posted on the  
23 HOLLYWOOD REPORTER WEBSITE: Lifetime, '24' Writer, 'Cold Case' Star  
24 Developing Casino Drama, By Lesley Goldberg dated 9/8/2011."

25 Request for Production No. 35 states, "Produce all DOCUMENTS that RELATE  
26 TO any publicly available source (including without limitation any press release, any  
27 public announcement, or any article published on DEADLINE) of information YOU used  
28 in connection with writing and/or publishing the following article posted on the



1 HOLLYWOOD REPORTER WEBSITE: Fox, DreamWorks Team on Steven  
2 Spielberg's 'Robopocalypse', By Pamela McClinktodk 9/7/2011."

3 Request for Production No. 36 states, "Produce all DOCUMENTS that RELATE  
4 TO any publicly available source (including without limitation any press release, any  
5 public announcement, or any article published on DEADLINE) of information YOU used  
6 in connection with writing and/or publishing the following article posted on the  
7 HOLLYWOOD REPORTER WEBSITE: TNT Orders Drama Pilot from 'CSI's' Carol  
8 Mendelsohn, By Lacey Rose dated 9/7/2011."

9 Request for Production No. 37 states, "Produce all DOCUMENTS that RELATE  
10 TO any publicly available source (including without limitation any press release, any  
11 public announcement, or any article published on DEADLINE) of information YOU used  
12 in connection with writing and/or publishing the following article posted on the  
13 HOLLYWOOD REPORTER WEBSITE: Bruce Helford in Talks to Showrun Charlie  
14 Sheen's 'Anger Management', By Lacey Rose dated 9/6/11."

15 Request for Production No. 38 states, "Produce all DOCUMENTS that RELATE  
16 TO any publicly available source (including without limitation any press release, any  
17 public announcement, or any article published on DEADLINE) of information YOU used  
18 in connection with writing and/or publishing the following article posted on the  
19 HOLLYWOOD REPORTER WEBSITE: CW Buys Cop Drama From 'Homicide' Team  
20 "Musketeers 3.0," By Philiana Ng, Lacey Rose dated 9/2/2011."

21 Request for Production No. 39 states, "Produce all DOCUMENTS that RELATE  
22 TO any publicly available source (including without limitation any press release, any  
23 public announcement, or any article published on DEADLINE) of information YOU used  
24 in connection with writing and/or publishing the following article posted on the  
25 HOLLYWOOD REPORTER WEBSITE: ABC Buys Comedy Project from  
26 'Accidentally On Purpose' Creator Claudia Lonow, By Lacey Rose dated 9/1/2011."

27 Request for Production No. 40 states, "Produce all DOCUMENTS that RELATE  
28 TO any publicly available source (including without limitation any press release, any



1 public announcement, or any article published on DEADLINE) of information YOU used  
 2 in connection with writing and/or publishing the following article posted on the  
 3 HOLLYWOOD REPORTER WEBSITE: Brad Weston Headed to New Regency, By  
 4 Pamela McClintock dated 9/1/2011."

5 Request for Production No. 41 states, "Produce all DOCUMENTS that RELATE  
 6 TO any publicly available source (including without limitation any press release, any  
 7 public announcement, or any article published on DEADLINE) of information YOU used  
 8 in connection with writing and/or publishing the following article posted on the  
 9 HOLLYWOOD REPORTER WEBSITE: 'Cougar Town' Creator Bill Lawrence Sells  
 10 Workplace Comedy to CBS, By: Lacey Rose dated 8/31/2011."

11 Request for Production No. 42: states, "Produce all DOCUMENTS that RELATE  
 12 TO any publicly available source (including without limitation any press release, any  
 13 public announcement, or any article published on DEADLINE) of information YOU used  
 14 in connection with writing and/or publishing the following article posted on the  
 15 HOLLYWOOD REPORTER WEBSITE: NBC Signs on to Adapt 'Romancing the  
 16 Stone,' By Lesley Goldbert dated 8/31/2011."

17 Request for Production No. 43, "Produce all DOCUMENTS that RELATE TO any  
 18 publicly available source (including without limitation any press release, any public  
 19 announcement, or any article published on DEADLINE) of information YOU used in  
 20 connection with writing and/or publishing the following article posted on the  
 21 HOLLYWOOD REPORTER WEBSITE: 'Hatfields and McCoys' Adds Tom Berenger,  
 22 Powers Boothe, Mare Winningham, By Lesley Goldberg dated 8/30/2011."

23 Request for Production No. 44, "Produce all DOCUMENTS that RELATE TO any  
 24 publicly available source (including without limitation any press release, any public  
 25 announcement, or any article published on DEADLINE) of information YOU used in  
 26 connection with writing and/or publishing the following article posted on the  
 27 HOLLYWOOD REPORTER WEBSITE: HBO Gives Pilot Order to Spike Lee, Mike  
 28 Tyson Boxing Drama, By Lacey Rose, Lesley Goldberg dated 8/30/2011."



1 Request for Production No. 45 states, "Produce all DOCUMENTS that RELATE  
2 TO any publicly available source (including without limitation any press release, any  
3 public announcement, or any article published on DEADLINE) of information YOU used  
4 in connection with writing and/or publishing the following article posted on the  
5 HOLLYWOOD REPORTER WEBSITE: 'The Damned' in Development at Showtime,  
6 By Lesley Goldberg dated 8/24/2011."

7 Request for Production No. 46 states, "Produce all DOCUMENTS that RELATE  
8 TO any publicly available source (including without limitation any press release, any  
9 public announcement, or any article published on DEADLINE) of information YOU used  
10 in connection with writing and/or publishing the following article posted on the  
11 HOLLYWOOD REPORTER WEBSITE: 'Up in the Air' Scribe Sells 'Jekyll & Hyde'  
12 Drama Project to ABC, By Lesley Goldberg dated 8/22/2011."

13 Request for Production No. 47, states, "Produce all DOCUMENTS that RELATE  
14 TO any publicly available source (including without limitation any press release, any  
15 public announcement, or any article published on DEADLINE) of information YOU used  
16 in connection with writing and/or publishing the following article posted on the  
17 HOLLYWOOD REPORTER WEBSITE: Phillip Noyce Inks First Look Deal at ABC,  
18 By Lacey Rose dated 8/4/2011."

19 Request for Production No. 48 states, "Produce all DOCUMENTS that RELATE  
20 TO any publicly available source (including without limitation any press release, any  
21 public announcement, or any article published on DEADLINE) of information YOU used  
22 in connection with writing and/or publishing the following article posted on the  
23 HOLLYWOOD REPORTER WEBSITE: Lionsgate UK Inks Content Supply Deal With  
24 Netflix, By Etan Vlessing dated 8/4/2011."

25 Request for Production No. 49 states, "Produce all DOCUMENTS that RELATE  
26 TO any publicly available source (including without limitation any press release, any  
27 public announcement, or any article published on DEADLINE) of information YOU used  
28 in connection with writing and/or publishing the following article posted on the



1 HOLLYWOOD REPORTER WEBSITE: 'Mission: Impossible -- Ghost Protocol'  
2 Bowing Abroad Prior to U.S. Release, By Pamela McClintock dated 7/27/2011."

3 Request for Production No. 50 states, "Produce all DOCUMENTS that RELATE  
4 TO any publicly available source (including without limitation any press release, any  
5 public announcement, or any article published on DEADLINE) of information YOU used  
6 in connection with writing and/or publishing the following article posted on the  
7 HOLLYWOOD REPORTER WEBSITE: 'The Walking Dead': Glen Mazzara in for  
8 Frank Darabont as Showrunner, By Lesley Goldberg dated 7/27/2011."

9 Request for Production No. 51 states, "Produce all DOCUMENTS that RELATE  
10 TO any publicly available source (including without limitation any press release, any  
11 public announcement, or any article published on DEADLINE) of information YOU used  
12 in connection with writing and/or publishing the following article posted on the  
13 HOLLYWOOD REPORTER WEBSITE: 'Camelot': Starz Not Moving Forward With  
14 Second Season, By Lacey Rose dated 6/30/2011."

15 Request for Production No. 52 states, "Produce all DOCUMENTS that RELATE  
16 TO any publicly available source (including without limitation any press release, any  
17 public announcement, or any article published on DEADLINE) of information YOU used  
18 in connection with writing and/or publishing the following article posted on the  
19 HOLLYWOOD REPORTER WEBSITE: Jennifer Finnigan to Star in USA Pilot 'Wild  
20 Card,' By Philiana Ng dated 6/29/2011."

21 Request for Production No. 53 states, "Produce all DOCUMENTS that RELATE  
22 TO any publicly available source (including without limitation any press release, any  
23 public announcement, or any article published on DEADLINE) of information YOU used  
24 in connection with writing and/or publishing the following article posted on the  
25 HOLLYWOOD REPORTER WEBSITE: Mark Gill Named President of Millennium  
26 Films, By Gregg Kilday dated 6/28/2011."

27 Request for Production No. 54 states, "Produce all DOCUMENTS that RELATE  
28 TO any publicly available source (including without limitation any press release, any



1 public announcement, or any article published on DEADLINE) of information YOU used  
2 in connection with writing and/or publishing the following article posted on the  
3 HOLLYWOOD REPORTER WEBSITE: Mark Gill Named President of Millennium  
4 Films, By Gregg Kilday dated 6/28/2011."

5 Request for Production No. 55 states, "Produce all DOCUMENTS that RELATE  
6 TO any publicly available source (including without limitation any press release, any  
7 public announcement, or any article published on DEADLINE) of information YOU used  
8 in connection with writing and/or publishing the following article posted on the  
9 HOLLYWOOD REPORTER WEBSITE: Comedy Central Adds Pair of Sketch Series,  
10 By Lesley Goldberg dated 6/28/2011."

11 In response to each of the foregoing requests for production, Prometheus refused to  
12 produce any documents. Specifically, Prometheus stated, "Subject to and without  
13 waiving the foregoing General Objections, Defendant objects to this Document Request  
14 as irrelevant to any claim or defense in this case. Defendant also objects to the request  
15 because it is vague, overbroad and unduly burdensome, and because it calls for  
16 documents that, if they were to be produced in spite of the foregoing objections, are of a  
17 type that would include Confidential Information that would only properly be produced  
18 under an appropriate confidentiality order."

19 The following is the text of the requests for admission at issue:

20 Request for Admission No. 6 states: "Admit that YOU requested one or more of  
21 YOUR employees, officers, directors, or contractors to monitor the content on  
22 DEADLINE during part or all of the time period from June through September 2011."

23 Request for Admission No. 7 states: "Admit that, on at least one occasion in the  
24 last two years, YOU have requested one or more of YOUR employees, officers, directors,  
25 or contractors to use content on DEADLINE in connection with the publication of  
26 content on the HOLLYWOOD REPORTER WEBSITE."



1 Request for Admission No. 8 states: "Admit that YOU requested that the  
2 OFFENDING CONTRACTOR make part or all of the homepage of the HOLLYWOOD  
3 REPORTER WEBSITE look similar to the homepage of DEADLINE."

4 Request for Admission No. 9 states: "Admit that YOU did not inspect the  
5 computer code that the OFFENDING CONTRACTOR provided to YOU in connection  
6 with the revisions to the HOLLYWOOD REPORTER WEBSITE that YOU published in  
7 2011."

8 Request for Admission No. 10 states: "Admit that the OFFENDING  
9 CONTRACTOR copied at least a portion of the FEATURED MODULE in connection  
10 with creating the THR MODULE."

11 Request for Admission No. 11 states: "Admit that YOU encouraged, instructed,  
12 and/or requested that the OFFENDING CONTRACTOR to copy at least a portion of the  
13 FEATURED MODULE in connection with creating the THR MODULE."

14 Request for Admission No. 12 states: "Admit that the OFFENDING  
15 CONTRACTOR performed work for YOU, other than the work that he performed in  
16 connection with the THR MODULE, in connection with which the OFFENDING  
17 CONTRACTOR copied computer code created by a third party."

18 Request for Admission No. 13 states: "Admit that YOU used an article published  
19 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
20 REPORTER WEBSITE: Jennifer Lopez, Silvio Horta Sell Family Dramedy to Fox, By  
21 Lacey Rose dated 9/13/2011."

22 Request for Admission No. 14 states: "Admit that YOU used an article published  
23 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
24 REPORTER WEBSITE: NBC Entertainment's In-House Studio Gets New Name and  
25 Key Exec Promotions, By Marisa Guthrie dated 9/12/2011."

26 Request for Admission No. 15 states: "Admit that YOU used an article published  
27 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
28



1 REPORTER WEBSITE: Ellen DeGeneres, Portia de Rossi Team for NBC Comedy, By  
2 Lesley Goldberg dated 9/9/2011."

3 Request for Admission No. 16 states: "Admit that YOU used an article published  
4 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
5 REPORTER WEBSITE: Toronto 2011: Michael Fassbender's 'Shame' Sells to Fox  
6 Searchlight, By Borys Kit dated 9/9/2011."

7 Request for Admission No. 17 states: "Admit that YOU used an article published  
8 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
9 REPORTER WEBSITE: Samuel Goldwyn Grabs North American Rights to Diana  
10 Vreeland Doc, By Borys Kit dated 9/9/2011."

11 Request for Admission No. 18 states: "Admit that YOU used an article published  
12 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
13 REPORTER WEBSITE: Russell Crowe in Negotiations to Star in 'Les Miserables', By  
14 Borys Kit dated 9/8/2011."

15 Request for Admission No. 19 states: "Admit that YOU used an article published  
16 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
17 REPORTER WEBSITE: Lifetime Cancels 'The Protector,' By Lesley Goldberg dated  
18 9/8/2011."

19 Request for Admission No. 20 states: "Admit that YOU used an article published  
20 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
21 REPORTER WEBSITE: Lifetime, '24' Writer, 'Cold Case' Star Developing Casino  
22 Drama, By Lesley Goldberg dated 9/8/2011."

23 Request for Admission No. 21 states: "Admit that YOU used an article published  
24 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
25 REPORTER WEBSITE: Fox, DreamWorks Team on Steven Spielberg's  
26 'Robopocalypse', By Pamela McClinktodk dated 9/7/2011."

27 Request for Admission No. 22 states: "Admit that YOU used an article published  
28 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD



1 REPORTER WEBSITE: TNT Orders Drama Pilot from 'CSI's' Carol Mendelsohn, By  
2 Lacey Rose dated 9/7/2011."

3 Request for Admission No. 23 states: "Admit that YOU used an article published  
4 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
5 REPORTER WEBSITE: Bruce Helford in Talks to Showrun Charlie Sheen's 'Anger  
6 Management', By Lacey Rose dated 9/6/11."

7 Request for Admission No. 24 states: "Admit that YOU used an article published  
8 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
9 REPORTER WEBSITE: CW Buys Cop Drama From 'Homicide' Team "Musketeers  
10 3.0," By Philiana Ng, Lacey Rose dated 9/2/2011."

11 Request for Admission No. 25 states: "Admit that YOU used an article published  
12 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
13 REPORTER WEBSITE: ABC Buys Comedy Project from 'Accidentally On Purpose'  
14 Creator Claudia Lonow, By Lacey Rose dated 9/1/2011."

15 Request for Admission No. 26 states: "Admit that YOU used an article published  
16 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
17 REPORTER WEBSITE: Brad Weston Headed to New Regency, By Pamela McClintock  
18 dated 9/1/2011."

19 Request for Admission No. 27 states: "Admit that YOU used an article published  
20 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
21 REPORTER WEBSITE: 'Cougar Town' Creator Bill Lawrence Sells Workplace  
22 Comedy to CBS, By: Lacey Rose dated 8/31/2011."

23 Request for Admission No. 28 states: "Admit that YOU used an article published  
24 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
25 REPORTER WEBSITE: NBC Signs on to Adapt 'Romancing the Stone,' By Lesley  
26 Goldbert dated 8/31/2011."

27 Request for Admission No. 29 states: "Admit that YOU used an article published  
28 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD



1 REPORTER WEBSITE: 'Hatfields and McCoys' Adds Tom Berenger, Powers Boothe,  
2 Mare Winningham, By Lesley Goldberg dated 8/30/2011."

3 Request for Admission No. 30 states: "Admit that YOU used an article published  
4 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
5 REPORTER WEBSITE: HBO Gives Pilot Order to Spike Lee, Mike Tyson Boxing  
6 Drama, By Lacey Rose, Lesley Goldberg dated 8/30/2011."

7 Request for Admission No. 31 states: "Admit that YOU used an article published  
8 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
9 REPORTER WEBSITE: 'The Damned' in Development at Showtime, By Lesley  
10 Goldberg dated 8/24/2011."

11 Request for Admission No. 32 states: "Admit that YOU used an article published  
12 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
13 REPORTER WEBSITE: 'Up in the Air' Scribe Sells 'Jekyll & Hyde' Drama Project to  
14 ABC, By Lesley Goldberg dated 8/22/2011."

15 Request for Admission No. 33 states: "Admit that YOU used an article published  
16 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
17 REPORTER WEBSITE: Phillip Noyce Inks First Look Deal at ABC, By Lacey Rose  
18 dated 8/4/2011."

19 Request for Admission No. 34 states: "Admit that YOU used an article published  
20 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
21 REPORTER WEBSITE: Lionsgate UK Inks Content Supply Deal With Netflix, By Etan  
22 Vlessing dated 8/4/2011."

23 Request for Admission No. 35 states: "Admit that YOU used an article published  
24 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
25 REPORTER WEBSITE: 'Mission: Impossible -- Ghost Protocol' Bowing Abroad Prior  
26 to U.S. Release, By Pamela McClintock dated 7/27/2011."

27 Request for Admission No. 36 states: "Admit that YOU used an article published  
28 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD



1 REPORTER WEBSITE: 'The Walking Dead': Glen Mazzara in for Frank Darabont as  
2 Showrunner, By Lesley Goldberg dated 7/27/2011."

3 Request for Admission No. 37 states: "Admit that YOU used an article published  
4 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
5 REPORTER WEBSITE: 'Camelot': Starz Not Moving Forward With Second Season, By  
6 Lacey Rose dated 6/30/2011."

7 Request for Admission No. 38 states: "Admit that YOU used an article published  
8 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
9 REPORTER WEBSITE: Jennifer Finnigan to Star in USA Pilot 'Wild Card,' By Philiana  
10 Ng dated 6/29/2011."

11 Request for Admission No. 39 states: "Admit that YOU used an article published  
12 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
13 REPORTER WEBSITE: Mark Gill Named President of Millennium Films, By Gregg  
14 Kilday dated 6/28/2011."

15 Request for Admission No. 40 states: "Admit that YOU used an article published  
16 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
17 REPORTER WEBSITE: Mark Gill Named President of Millennium Films, By Gregg  
18 Kilday dated 6/28/2011."

19 Request for Admission No. 41 states: "Admit that YOU used an article published  
20 on DEADLINE to assist in creating the following article posted on the HOLLYWOOD  
21 REPORTER WEBSITE: Comedy Central Adds Pair of Sketch Series, By Lesley  
22 Goldberg dated 6/28/2011."

23 In response to each of the foregoing requests for admission (except for No. 41, for  
24 which Prometheus provided no objection or response), Prometheus refused to admit or  
25 deny any facts. Instead, Prometheus merely objected as follows, "Without waiving any  
26 objections and without admitting any facts whatsoever, Defendant objects to this Request  
27 on the basis that it is not relevant to any claim or defense in this action. Defendant also  
28



1 objects on the ground that the Request seeks Confidential Information that Defendant  
2 could only provide under an appropriate confidentiality order."

## 3 2. Reasons to Compel a Further Response

4 Penske's complaint explains in detail the relationship between Prometheus' copying  
5 of the source code on its TVLine website homepage, on one hand, and Prometheus'  
6 attempts to copy Penske's other intellectual property and poach Penske's most creative  
7 employees under long-term contracts, on the other hand. Among other things,  
8 Prometheus' unified course of action all reflects: (1) an acknowledgement that Penske has  
9 better reporting and better website design than Prometheus has; and (2) a willingness to  
10 go to any means necessary to undermine the competitive advantage that Penske earned by  
11 recruiting top level talent to work there. Prometheus has asserted the shallow theory that  
12 this discovery is irrelevant because these ancillary instances of Prometheus copying and  
13 free-riding off Penske's work are not the direct cause of the damage alleged in the  
14 complaint. However, the test of whether a defendant's act is relevant to a claim or  
15 defense is not whether the act caused harm, but whether the act tends to prove or disprove  
16 the claim. Here, Prometheus fails to acknowledge that its other acts of copying are  
17 relevant because they show a pattern of closely related conduct that all reveals a  
18 coordinated intent to undermine Penske's advantage in developing a more creative and  
19 talented workforce. Thus, the Court should compel a further response to Special  
20 Requests for Production No. 1-10, 27-55, Requests for Admission No. 1-41, and Special  
21 Interrogatory No. 1 and 16.

## 22 B. Prometheus' Position: Penske Wrongfully Seeks Information about Issues 23 Completely Unrelated to the Copyright Claim<sup>6</sup>

24 The requests at issue here have nothing to do with Penske's sole cause of action,  
25 i.e., for alleged copyright infringement of its carousel code. Instead, Penske seeks  
26 information about how its competitor, THR, prepares stories and recruits talent. Penske

27  
28 <sup>6</sup> For the sake of brevity, Prometheus will not repeat the text of the relevant discovery requests and responses, which are included in Penske's argument on this Issue.



1 even admits, *supra*, that what it is seeking is “discovery that will reveal Prometheus’  
 2 overall plan for competing with Penske.” The complaint is padded with colorful  
 3 allegations about THR’s alleged stealing of Penske’s stories and poaching of its  
 4 employees. These allegations, like the filing of the suit itself, obviously were motivated  
 5 by a desire to injure a competitor through negative publicity. Not only are Penske’s  
 6 allegations nonsense, but they obviously have no connection whatsoever to the copyright  
 7 claim. Requests for facts in support of these allegations thus fall far outside the scope of  
 8 proper discovery under Rule 26, which allows parties to “obtain discovery regarding any  
 9 nonprivileged matter that is *relevant to any party’s claim or defense....*” Fed. R. Civ. P.  
 10 26(b)(1).

11 Simply because Penske dwells so much on these issues, Prometheus must start by  
 12 noting: The allegations about theft of stories and employees are nonsense. Prometheus  
 13 reports its own stories, and it competes lawfully and fairly for journalistic talent. In  
 14 particular, if Prometheus happens to report and publish its own version of a story that first  
 15 appeared on a Penske website, that is completely lawful and proper – and that is all  
 16 Penske actually alleges.

17 Penske’s discovery requests in connection with the so-called “attempt[] to ...  
 18 poach Penske’s most creative employees under long-term contracts” are not tied to the  
 19 copyright cause of action. Penske has pled no claim for “unlawful competition” or  
 20 tortious interference with contractual relations. Likewise, Penske’s requests relating to  
 21 THR’s supposed “Practice of Monitoring Penske’s Websites for the Purpose of  
 22 Misappropriating Hot News” have nothing to do with the copyright cause of action pled.<sup>7</sup>

23 Discovery on topics completely unrelated to the carousel code is completely  
 24

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25 <sup>7</sup> Notably, Penske at one point threatened to amend the complaint to include a claim for the tort of “hot  
 26 news misappropriation” – but it never made that amendment. This is not surprising - as Penske’s own  
 27 counsel has argued in another case, the “hot news” tort is not even recognized in California. *See Reply*  
 28 *in Supp. of Mot. to Dismiss at 3, X17, Inc. v. Lavandeira*, No. CV 06-7608-GAF (C.D. Cal. Feb. 5,  
 2007). Accordingly, if Penske had attempted to add a “hot news” claim, that effort would have failed as  
 a matter of law and could not have supported the requested discovery.



1 unsupported. *See, e.g., Robinson v. Adams*, 2011 WL 2118753, at \*3-4 (E.D. Cal. May  
2 27, 2011) (when only claim in case was for failure to train and supervise, allegations that  
3 plaintiff was deprived of property were not relevant and not a proper subject for  
4 discovery); *Germane Music v. Universal Songs of Polygram*, 2006 WL 3780131 (D. Nev.  
5 2006) (discovery relating to cause of action that had been dismissed from case was not  
6 permissible because not relevant to any live cause of action). Penske's suggestion that  
7 the alleged theft of stories and employees somehow forms a "pattern" with the code  
8 incident is, at best, imaginative. Discovery in a copyright case should be about the  
9 copyright claim. Penske should not be permitted to explore the editorial and personnel  
10 practices of a major competitor on such a flimsy basis.

#### 11 12 **XI. PENSKE'S CONCLUSION**

13 For the foregoing reasons, Penske respectfully requests that the Court issue an  
14 order compelling Prometheus to provide further responses and production in response to  
15 the Special Interrogatory No. 1, 6, and 10-16, Requests for Production No. 1-10, 27-59,  
16 and Requests for Admission No. 1-41.

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1 **XII. PROMETHEUS' CONCLUSION**

2 For the foregoing reasons, Prometheus respectfully requests that the Court deny  
 3 Penske's Motion to Compel as untimely or, in the alternative, deny the motion as  
 4 unsupported. To the extent that the Court reaches the substance of Penske's motion,  
 5 Prometheus requests that the Court also consider, and grant, Prometheus's own motion to  
 6 compel.

7  
 8 Dated: November 28, 2012

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